By reason of this clause, a citizen of Ohio had his claim postponed; and the court holds that he has been deprived of the privileges and immunities of citizenship in violation of Article IV., section 2, of the United States Constitution. *Blake* v. *McClung*, 19 Sup. Ct. Rep. 165. The first step that had to be taken in reaching this conclusion was to hold that the preferred class of persons, "residents of Tennessee," comprised in reality "citizens of Tennessee"; otherwise there could be no discrimination against citizens of other States, *qua* citizens. Yet this step is difficult to take in view of the principle that of two constructions a statute should be given the one which keeps it within the limits of the constitution; and it would seem that the majority of the court, who thought the statute invalid if it discriminated against citizens of other States, should have given it the more literal construction unless as so construed it would be hopelessly unreasonable. Cf. Holmes, J., in *Commonwealth* v. *Perry*, 155 Mass. 117. And hopelessly unreasonable a discrimination is not, which favors residents of the State without reference to citizenship. A greater reason, in fact, might be thought to exist for a legislature's giving protection to all those residing within its jurisdiction than for protecting those residents and non-residents who happened to be citizens of the State.

The taking of this difficult step, however, does not leave the present decision free from doubt; and there is great force in the dissent of Mr. Justice Brewer, in which the Chief Justice concurred. When the State granted the foreign company the favor of incorporation, it could exact certain securities for the protection of its own citizens. For their sole benefit the State might have required pledges. This is admitted by the majority of the court, and in admitting it they seem to admit the whole case. For if the corporation might be required to pledge some of its property, the property pledged might amount to all that the corporation owned within the State. If the legislature could compel this, why should it require the formalities of a pledge or a mortgage? A mortgage consists in acts by the parties to which the law attaches legal consequences; but the legislature has power to enact these legal consequences without prior acts by the parties. That was in effect done in the principal case; certain persons were given a claim to property without the formalities of a mortgage or deposit as security; but the legal consequences are much alike in either case and the attempt made in the majority opinion to distinguish the two is not convincing. So far as justice to foreign dealers is concerned, the incumbrance by statute is as fair as that by act of the parties; a statute on the books is quite as obvious as a record in the registry of deeds. Granted then that the statute protected citizens of Tennessee as such, it is hard to see what deprivation of privileges and immunities was inflicted on the citizens of other States.

RECENT CASES.

ADMIRALTY — JURISDICTION — PERSONAL INJURIES. — A ladder attached to the side of a ship was negligently left in an unsecure condition. The libellant, in attempting to leave the ship by means of the ladder, was thrown upon a wharf and injured. *Held*, that a Court of Admiralty has jurisdiction of libellant's claim for damages. *The Strabo*, 90 Fed. Rep. 110 (Dist. Ct., N. Y.).

Not only is this decision sound, but the true principle upon which these jurisdictional questions depend is well stated. There is much confusion of statement in the cases as

to what is the test to determine when a Court of Admiralty has jurisdiction. In the *Mary Stewart*, 10 Fed. Rep. 137, and in a number of subsequent cases, it is said that the damage must have happened on water. In fact, neither the place where the damage occurs nor the place where the negligent omission of duty takes place determines the jurisdiction. It depends upon the place where the force which produces the damage is applied to the injured person. In certain cases, for example, where a person is thrown from a ship to a wharf, as in the principal case, either a common law or admiralty court may have jurisdiction, there having been two acts of injury, one upon the ship, another upon the wharf. The opinion in the principal case furnishes a safe guide for the determination of future cases.

AGENCY — MASTER AND SERVANT — TORTS. — Plaintiff was injured through the negligent management of a carriage in which defendant was driving. Defendant owned the carriage, horses, and harness. The coachman was a regular employee of a livery stable keeper, who took care of the horses and carriage, and who furnished a driver whenever needed by defendant. *Held*, that a jury might reasonably find that the relation of master and servant existed between the defendant and the coachman at the time of the accident. *Jones* v. *Scullard*, [1898] 2 Q. B. D. 565.

This decision recognizes the test adopted by the weight of authority in fixing the liability for the torts of a servant, namely, that he is responsible as master who had the authority to control the conduct of the servant in the work in which he was engaged at the time of the accident. Story, Agency, 9th ed., § 453 (b); *McGuire* v. *Grant*, 29 N. J. Law, 356, 371; *Sproul* v. *Hemingway*, 14 Pick. 1, 5. In the principal case, if the horses had belonged to the stable-keeper he would be responsible as master, and not the owner of the carriage. *Quarman* v. *Burnett*, 6 M. & W. 499. In that case the latter could not have given unreasonable orders as to the driving, as the driver would have been warranted in disobeying them in the interest of his own employer, the owner of the horses. As the facts were, the driver would have had no excuse for disobedience beyond a reasonable consideration for his own safety, and so was more completely under the control of defendant. See *Donovan* v. *Daing, etc. Construction Co.*, [1893] 1 Q. B. D. 629.

CARRIERS — THROWING PACKAGES FROM MOVING TRAINS. — A news agent threw a package of papers from defendant's train while it was passing through a small station, and the package struck and injured the plaintiff. The news agent was not a servant of the defendant, but it was customary to throw packages from the train. *Held*, that a nonsuit is not error. *McGrath* v. *Eastern Ry. Co.*, 77 N. W. Rep. 136 (Minn.).

The plaintiff must show negligence on the part of the defendant, but even if the act is not done by a servant of the company, the courts hold it liable if the act is done in accordance with a dangerous custom known to the company. *Galloway* v. *Chicago R. R. Co.*, 56 Minn. 346; *Snow* v. *Fitchburg R. R. Co.*, 136 Mass. 552. The court in the principal case directed a nonsuit, on the ground that there was no evidence of negligence, since the custom was not dangerous. In a similar case, however, where a company allowed its employees to throw sticks of wood off the train at their various homes along the line, a nonsuit in the lower court was held to be error. *Fletcher* v. *Baltimore & P. R. R. Co.*, 168 U. S. 135. There is very little authority on the point, but since it is purely a question of fact it is hard to support the peremptory action taken by the court in the principal case, which seems very close to the line.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS — JURISDICTION OF FEDERAL COURT. — By the Funding Act of 1871, the State of Virginia agreed that coupons of certain bonds should be receivable for taxes. By reason of a later statute, forbidding the receipt of anything but legal tender for taxes, plaintiff was refused relief in a suit duly brought to obtain credit for coupons held by him. The ground of the decision was that the original agreement by the State was unconstitutional. *Held*, that the United States has authority to review this decision, since it appears by the record that effect was really given to the later statute. *McCullough* v. *Virginia*, 19 Sup. Ct. Rep. 134. See NOTES.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EQUAL PROTECTION OF THE LAWS. — A New York statute imposed a tax on the "franchise or business" of all corporations and associations doing business in that State, with an exemption in favor of companies engaged wholly in manufacturing within the State. On a writ of error to the New York Court of Appeals, it was *held*, that this statute does not deny the equal protection of the laws to a Michigan corporation doing business partly in New York, and does not amount to an unconstitutional regulation of interstate commerce. *New York* v. *Roberts*, 19 Sup. Ct. Rep. 58, 72. HARLAN and BROWN, JJ., dissenting.

The only Federal questions involved were the validity of the tax under the Fourteenth Amendment and under the interstate commerce clause. The discrimination in favor of domestic manufactures is hardly so arbitrary as to be judicially pronounced a denial of the equal protection of the laws. Whether the statute amounts to an unconstitutional regulation of commerce is a more difficult problem. The tax was not laid on the business of selling imported goods, as was the case in *Brown* v. *Maryland*, 12 Wheat. 419, but upon business of any description. That the amount of such a tax upon a legitimate subject is gauged with reference to non-taxable property, does not impair its validity. *Home Insurance Co.* v. *New York*, 134 U. S. 594. The effect of the exemption in the statute under consideration is unquestionably the promotion of domestic manufactures; but, so long as interstate commerce is not interfered with, this is a legitimate object. For example, manufacturing plants are sometimes exempted from taxation in order to induce factories to remove from localities where no such immunity is conferred. Although by these means interstate commerce is perhaps indirectly reduced in volume, apparently the validity of such laws has not for that reason been impeached. Upon the whole, therefore, the effect of the New York legislation upon interstate commerce is somewhat too remote to impair its constitutionality.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS. — A Tennessee statute, after providing for the incorporation of foreign corporations of certain kinds doing business within the State, provided that all property owned by such a corporation should be primarily liable for debts due to residents of the State. On postponement of the claim of a creditor, citizen of Ohio, *held*, that he was deprived of the privileges and immunities to which he was entitled by Article IV., § 2, of the Federal Constitution. *Blake* v. *McClung*, 19 Sup. Ct. Rep. 165. See NOTES.

CONSTITUTIONAL LAW — TAXATION — SPECIAL ASSESSMENTS. — The village of Norwood, Ohio, laid a road through the plaintiff's premises. After paying plaintiff for the land taken, the town assessed that expense, together with the costs of the condemnation proceedings, upon the plaintiff's land, under a provision in the State statute allowing such assessment upon the abutters by front foot. *Held*, that this assessment was unconstitutional, and its collection may be enjoined. *Norwood* v. *Baker*, 19 Sup. Ct. Rep. 187. GRAY, BREWER, and SHIRAS, JJ., dissenting.

This decision marks the final adoption by the United States Supreme Court of the New Jersey doctrine, that a special assessment levied under a rule which makes it possible that the assessment may exceed the benefit to the land in question is void. *State* v. *Mayor of Newark*, 37 N. J. Law, 416. The principle that a rule of assessment must not be arbitrary, and must have some relation to the benefits, is sound; but the soundness of the application of the principle in the present case is more doubtful. The legislature has the right to judge of benefits. Computation of them is difficult, and the legislature may well have thought a handy rule desirable. While the rule in question may have been somewhat "rule of thumb," it laid the burden on those who must have been to some extent benefited; the court could hardly say it was so devoid of reason as to be an improper use of the taxing power.

CONTRACT — DAMAGES — MISTAKE IN TRANSMISSION OF TELEGRAM. — A message was given by the plaintiff to the defendants, a telegraph company, for transmission to his attorneys, which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount. In a suit for the loss caused thereby, *held*, that the defendants are liable for the remainder of the plaintiff's claim. *Western U. T. Co.* v. *Beals*, 76 N. W. Rep. 903 (Neb.). See NOTES.

CONTRACTS — CONSIDERATION VALUELESS IN PART. — A landlord made an oral contract with a tenant for the lease of certain saloon buildings. There was a collateral stipulation that the landlord should refrain from selling cigars upon his adjoining premises. By the local Statute of Frauds the lease was valid, but the collateral provision was unenforceable. *Held*, that the whole contract is bad for failure of consideration. *Higgins* v. *Gager*, 47 S. W. Rep. 848 (Ark.). See NOTES.

CONTRACTS — VOID CONDITIONS. — A clause in an insurance policy provided that no action thereon should be sustainable at law unless brought within twelve months after the occurrence of the loss. *Held*, that it is against public policy to allow parties to fix a time within which an action may be brought different from that set in the Statute of Limitations. *Omaha Fire Ins. Co.* v. *Drennan*, 77 N. W. Rep. 67 (Neb.).

The same result has been previously reached in Nebraska. *Miller* v. *State Ins. Co.*, 54 Neb. 121. *Accord*, *French* v. *Lafayette Ins. Co.*, 5 McLean, 461. By the great weight of authority, however, the clause in the principal case is held to be valid. 2 Wood, Fire

Insurance, 2d ed., § 460. What consideration of policy or principle of law is offended by such a condition does not seem clear. The Statute of Limitations confers no new right of action but merely restricts the time, otherwise unlimited, within which an existing right may be asserted. It seems to be wholly within the spirit of this enactment, if not in actual furtherance of its design, that parties, in forming a contract, should still further limit the time allowed them for bringing actions thereon. Cf. *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386. The holding in the principal case places an apparently unwarranted restriction on a person's freedom to contract.

CRIMINAL LAW — ARSON. — A house was blown up with dynamite, and splinters were torn from the roof and fired by the explosion. *Held*, that this does not constitute arson. *Landers* v. *State*, 47 S. W. Rep. 1008 (Tex., Cr. App.).

The case raises a novel point. It is clear that the burning of parts of a house already detached, is not arson. *Mulligan* v. *State*, 25 Tex. App. 199. In the principal case, however, the splinters were set on fire and detached simultaneously. The court, doubtless, reaches a sound result, for even if it could be said that the splinters were fired while a part of the house, still there was no burning of them in the sense of that term as used in connection with arson, till after they were detached. 2 Bish. Cr. L., § 10.

CRIMINAL LAW — CONSTITUTIONAL LAW — ABSENCE OF JUDGE FROM COURT ROOM DURING TRIAL. — During a trial for felony the judge left the court room for twenty minutes without suspending proceedings. *Held*, that a defendant convicted under such circumstances was deprived of his liberty without due process of law, and a new trial must be granted. *People* v. *Tupper*, 55 Pac. Rep. 125 (Cal., Sup. Ct.).

It is generally held that when the judge has first obtained the consent of the defendant's counsel to leave the court room, or where his absence could not possibly have been prejudicial to the defendant's interests, a new trial will not necessarily be granted. *Pritchett* v. *State*, 92 Ga. 65; *Tuberville* v. *State*, 56 Miss. 793. With these exceptions, the courts in such cases uniformly order a retrial. *O'Brien* v. *People*, 17 Colo. 561; *Hayes* v. *State*, 58 Ga. 35. From the brief statement of facts it does not appear whether the present case was within the recognized exceptions to the rule; but it seems better, both on theory and in practice, to limit the exceptions as much as possible. The judge is essentially a component part of the court, and anything done in his absence is done in the absence of a complete court and, therefore, without due process of law.

CRIMINAL LAW — LARCENY — VENUE. — A thief stole goods in one county and carried them with him into another. *Held*, that the venue was properly laid in the latter county *State* v. *Williams*, 47 S. W. Rep. 891 (Mo.). See NOTES.

DAMAGES — ACTION FOR DEATH. — Plaintiff sues under a statute to recover damages for the death of his mother, caused by defendant's negligence. Not being able to show any pecuniary damage, *held*, plaintiff cannot recover nominal damages. *Lazelle* v. *Town of Newfane*, 41 Atl. Rep. 311 (Vt.).

Under similar statutes allowing recovery for death, it is almost universally the rule, that no recovery can be had for mental suffering, and no exemplary damages are allowed. *Pennsylvania R. R. Co.* v. *Vandever*, 36 Pa. St. 298; *Louisville R. R. Co.* v. *Goodykoontz*, 119 Ind. 111. The courts generally treat these statutes as providing merely a compensative remedy for the pecuniary loss, and under such an interpretation the principal case seems manifestly correct. *Holton* v. *Daly*, 106 Ill. 131. It is hard to see why nominal damages should be given when no actual damage can be shown, unless the statute declares that death caused by negligence is a cause of action *per se*. Yet most of the American cases hold, contrary to the principal case, that nominal damages can always be recovered. *Howard* v. *Canal Co.*, 40 Fed. Rep. 195; *Chicago R. R. Co.* v. *Swett*, 45 Ill. 197. The principal case is, however, in accord with the English rule, and seems correct on principle. *Duckworth* v. *Johnston*, 4 Hurl. & N. 653.

EVIDENCE — BURDEN OF PROOF — DIRECTING VERDICT. — *Held*, that where one party offers testimony to sustain his burden of proof, the other party, although offering nothing to contradict it, is entitled to have the jury pass upon the case, and a direction of a verdict against him is improper. *Gannon* v. *Laclede Gas Light Co.*, 46 S. W. Rep. 968; 47 S. W. Rep. 907 (Mo.). Three judges dissenting.

The decision practically overrules the case of *Reichenbach* v. *Ellerbe*, 115 Mo. 588, and follows the earlier and sounder adjudications in the same State. It is universally held that the court should direct a verdict only when a contrary finding by the jury would be set aside as against the evidence. Profatt, Jury Trial, § 354. The dissenting judges necessarily take the position that where the burden of proof is sustained by

uncontradicted testimony, the court must set aside a verdict which is not in accordance with such testimony. The inquiry in all cases where a verdict is sought to be set aside, is whether the jury acted as reasonable men in coming to their conclusion. *The Metrop. Ry. Co.* v. *Height*, 11 App. Cas. 152. And it cannot be said that the jury, in failing to be convinced by testimony, must have acted unreasonably, simply because such testimony was uncontradicted. Any such view confuses unimpeached testimony with proof. It denies to the jury its acknowledged right to pass upon the credibility of witnesses and, while acting within the bounds of reason, to disregard any testimony that fails to convince.

EVIDENCE — CREDIBILITY OF WITNESS — CONTRADICTING ONE'S OWN WITNESS. — In an action on a lease, plaintiff alleged that the instrument was in the possession of defendants. To prove this, and the original execution, plaintiff called an agent of defendants with whom he made the lease and in whose possession he had last seen it. Later, defendants called the same witness, who testified that the paper was not a lease. On cross-examination, plaintiff, to discredit the witness, proposed to ask him whether he did not, after soliciting the lease, tell others that he had leased the land. *Held*, that the question should have been allowed. *Morris* v. *Guffey*, 41 Atl. Rep. 735 (Pa.).

The lower court refused to allow the question, on the ground that, by calling the witness, plaintiff made him his own witness, and therefore could not discredit him. That a party cannot discredit his own witness is well established. *Pollock* v. *Pollock*, 71 N. Y. 137. The higher court said that as it was necessary to call the witness to account for not producing the lease, plaintiff did not give credit to him. Where the witness is not one of the party's own selection, but is one selected by the law as necessary to prove a particular fact, as in the case of a subscribing witness to a deed or will, he can hardly be considered as the witness of the party calling him, and therefore his truthfulness may generally be attacked. *Crocker* v. *Agenbroad*, 122 Ind. 587. The witness in the principal case was not one whom the law obliged plaintiff to call, and the ruling seems to be an unwarranted extension of the exception, that will to a great extent destroy the force of the original rule.

INSOLVENCY — DISCHARGE — ACTION BY FOREIGN CORPORATION. — Plaintiff, a foreign corporation, established an office in Massachusetts, and procured a license for the sale of its goods. It also, in accordance with the law, appointed the commissioner of corporations its attorney, upon whom all lawful process in any action against it might be served. Defendant bought goods of plaintiff at its local office, and afterward obtained a discharge in insolvency under the Massachusetts insolvency laws. Plaintiff did not prove its claim, but subsequently brought an action. *Held*, that the discharge is not a bar to the action. *Bergner & Engel Brewing Co.* v. *Dreyfus*, 51 N. E. Rep. 531 (Mass.).

The terms of the insolvency statute, as well as of the discharge itself, are broad enough to bar the plaintiff's claim. Pub. St., c. 157, sec. 81. But the United States Supreme Court has held that a discharge in insolvency by a State court is not a bar to an action by a creditor of another State who does not come in to prove his claim. *Baldwin* v. *Hale*, 1 Wall. 223. The grounds urged for exception in the present case are that the plaintiff had an office in the State, held a license granted by the State, and had appointed the commissioner of corporations its attorney on whom lawful process might be served. It is settled in Massachusetts that a creditor of another State, merely because he does business in Massachusetts, is not barred by a discharge of his debtor, if his claim is not proved in the insolvency proceedings. *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11. A corporation has its domicile in the State which created it, and consequently it has no domicile elsewhere. *Boston Investment Co.* v. *City of Boston*, 158 Mass. 461. On principle it seems that a discharge should bar a claim by a corporation having a regular place of business in the State on a contract made within the State. However, the decision is within the principle of the earlier Massachusetts cases, and is correct on authority.

INSURANCE — CONSTRUCTION OF ACCIDENT POLICY. — An accident insurance policy contained a provision that the insurance did not extend to death resulting from poison. The insured took poison under the mistaken belief that it was harmless medicine. *Held*, that the case is covered by the excepting clause and the insurer is not liable. *McGlather* v. *Prov. Mut. Acc. Ins. Co.*, 89 Fed. Rep. 685 (C. C. A., Eighth Cir.). One judge dissenting.

The decision is supported by the weight of authority, although in several jurisdictions a contrary result has been reached. *Early* v. *Standard Life & Acc. Ins. Co.*, 71

N. W. Rep. 500 (Mich.); *Healey* v. *Mut. Acc. Ass.*, 133 Ill. 556. The construction placed by the court upon the excepting clause appears to be in accordance with good sense and sound reason. The dissenting judge finds a conclusive analogy between the principal case and those cases in which it has been held that the exception in an insurance policy of death from inhaling gas covers voluntary inhaling only. *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472. The result reached in those decisions is forced and technical but, granting their soundness, they cannot be said to conclude cases like the present. It was found necessary in those cases to hold that the word "inhaling" implied a voluntary act, but no such notion can be imputed to the clause "resulting from poison," and hence the analogy fails.

MASTER AND SERVANT — WRONGFUL DISCHARGE — MEASURE OF DAMAGES. — The plaintiff entered into a contract to serve the defendant for a year. He was wrongfully discharged at the end of two months, and brought an action against the defendant before the expiration of the year. *Held*, that the measure of damages is the amount of the plaintiff's wages to the time of the trial, less what he had been paid and what he could have earned by reasonable efforts between the time of his discharge and the time of trial. *Sommer* v. *Conhaim*, 54 N. Y. Supp. 146 (Sup. Ct., App. Term).

The doctrine of this case is contrary to the English decisions and to the weight of American authority, and is wholly indefensible in principle. However, it has some support. *Gordon* v. *Brewster*, 7 Wis. 355; *Association* v. *Wiedenman*, 28 N. E. Rep. 834 (Ill.); *Van Winkle* v. *Salterfield*, 58 Ark. 617. The court base the refusal to allow a recovery for damages that may accrue between the time of trial and the expiration of the term of employment, upon the argument that such damages are so uncertain and contingent as to make it unsafe to attempt to estimate them. The argument is equally applicable in actions of tort for personal injuries in which prospective damages are constantly estimated. *Curtis* v. *The Rochester, etc. R. R. Co.*, 18 N. Y. 534. The objections to such a rule are obvious. The employee must elect to bring his action immediately upon his discharge and thus lose a large part of the damages to which he is entitled, or he must wait until the expiration of the term, and thus run the risk of loss of evidence and the solvency of his employer. Indeed, in certain cases he may be forced to sue before the term expires or have his action barred by the Statute of Limitations. As a matter of fact, while it is always essential that the damage should flow certainly from the defendants' wrongful act, certainty in the amount of the damage is never requisite to a recovery.

PERSONS — DIVORCE — ATTORNEY'S FEES. — Plaintiff, an attorney, commenced a divorce suit for a wife, but the suit was dismissed through the collusion of the husband and wife, without the plaintiff's knowledge. *Held*, that the plaintiff is entitled to recover reasonable attorney's fees from the husband in an action at law. *Ceccato* v. *Deutscham*, 47 S. W. Rep. 739 (Tex., Civ. App.).

It is generally held in this country that the compensation by the husband of an attorney for services rendered to the wife in conducting a divorce suit, is a matter solely within the discretion of the divorce court. *Wescott* v. *Hinckley*, 56 N. J. Law, 343. The reason given is that the contract of marriage is indissoluble at common law, and the husband cannot therefore be put under a legal obligation to provide for its dissolution. *Shelton* v. *Pendleton*, 18 Conn. 417. The principal case, however, is in accord with the English decisions, which hold that such services are within the common law definition of necessaries. *Brown* v. *Ackroyd*, 5 E. & B. 819. This rule seems to be sound. Legal services essential to relieve the wife from physical or mental distress occasioned by the husband, are held to be necessaries for the wife. *Conant* v. *Burnham*, 133 Mass. 505. And services essential to secure or prevent the annulment of the contract of marriage, seem equally necessary. Otherwise the wife might be unable to obtain counsel to adequately enforce her rights.

PROPERTY — EJECTMENT — RESERVATION OF TITLE. — The plaintiff contracted to sell the defendant railroad company a right of way over his lands, reserving title to himself until the notes given for the purchase money should be paid. *Held*, that the plaintiff cannot maintain an action of ejectment after the railroad company, with the plaintiff's consent, has built its track across the land, even though the notes are unpaid. *Atlanta, Knoxville, etc. R. R. Co.* v. *Barker*, 31 S. E. Rep. 452 (Ga.).

This is well settled law, and is based upon principles of public policy. In the present case actual authority was given to the railroad company, but it has been held that even where there was no actual authority, but where the individual merely acquiesced in the building of the road across his land as part of a continuous line, he is estopped from afterwards bringing an action of ejectment, even though he still

retains the title to the land. *Porter* v. *The Midland R. R. Co.*, 125 Ind. 476; *Thornton* v. *Cairo & Fulton R. R. Co.*, 31 Ark. 394. A railroad is charged with duties to the public, and, for the sake of the public interests involved, an individual, in a case like the present one, will be restricted to such remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. The case will naturally be different when the owner has not acquiesced in the act of the railroad company, but has, at all times, used reasonable diligence to protect this property from the unlawful entry. *Denver & S. F. R. R. Co.* v. *School Dist. No.* 22, 14 Colo. 327. In actions between individuals, the public interest not being involved, this principle would, of course, be inapplicable. *Alston* v. *Wingfield*, 53 Ga. 18; *McDaniel* v. *Gray*, 69 Ga. 433.

PROPERTY — INJUNCTION — COMMON-LAW COPYRIGHT. — Complainant society filed a bill to enjoin defendants from using, as an advertisement of a medicine, extracts from a committee report read at a meeting of complainant society. By affidavits it appeared that persons were present at the meeting who were not members, but it did not appear that the meeting was open to the general public. On a motion for a preliminary injunction upon the affidavits, *held*, that publication of the report is not shown, and complainant is entitled to the relief asked. *New Jersey State Dental Society* v. *Denticura Co.*, 41 Atl. Rep. 672 (N. J., Ch.).

A common law right of property in an unpublished writing, whatever may be the theoretical objections to it, is generally recognized in this country. *Tompkins* v. *Halleck*, 133 Mass. 32. But *cf.* PARKE, B., in *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 919. Publication then is held to dedicate this property to the public. No such dedication is found in the principal case, and the conclusion seems correct. Too much stress is perhaps laid on complainant's intention not to dedicate; no one who publishes a book intends to part with the work itself, as a piece of literary workmanship. Nor is the fiduciary position of the hearers of much importance as touching the mere fact of publication. The owner of the writing is the person to look at; what he did is the question. Under all the circumstances, the act of complainant society in the principal case hardly constitutes an abandonment to the public at large. See 12 HARV. LAW REV. 51.

PROPERTY — WAYS OF NECESSITY. — The plaintiff's land was entirely surrounded by the defendant's park. The sole mode of access was by a highway, and the highway was later extinguished by the proper authorities. *Held*, that the plaintiff has no right to a way of necessity over the defendant's land. *Ellis* v. *Blue Mountain Forest Assn.*, 41 Atl. Rep. 856 (N. H.). See NOTES.

QUASI-CONTRACTS — MONEY PAID FOR ILLEGAL PURPOSES. — The defendant falsely represented to the plaintiff that a criminal prosecution had been instituted against the latter, and obtained money from him to bribe the prosecuting officer to stop proceedings. *Held*, that the plaintiff can recover the money. *Smith* v. *Blachley*, 41 Atl. Rep. 619 (Pa.).

The decision seems correct. The plaintiff's illegal intention in giving the money to the defendant should not bar his recovery unless it is against public policy. The test applied by the courts in similar cases seems to be, whether recovery will give effect to the illegal transaction, or whether it will prevent its performance. Thus in the analogous case of money paid under an illegal contract, it is generally held that the money can be recovered at any time before the contract is performed. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Duval* v. *Wellman*, 124 N. Y. 156; *Taylor* v. *Bowers*, 1 Q. B. D. 300. But when the illegal transaction is partly or wholly performed, the courts will not allow either party to take advantage of its illegality, and therefore money paid under it cannot be recovered. *Kearley* v. *Thomson*, 24 Q. B. D. 742; *Tyler* v. *Carlisle*, 79 Me. 210. In the principal case the money had never been applied as the defendant represented, and since the plaintiff did not rely on any illegal contract, and the transaction was still unperformed, recovery was properly allowed. *Catts* v. *Phalen*, 2 How. 376.

RECEIVERSHIP — EQUITABLE CHARGE ON INCOME. — A telegraph and telephone company went into the hands of a receiver. *Held*, that operators have a claim against the company, for wages for ninety days preceding the appointment of the receiver, superior to the lien of the mortgage debt. *Keelyn* v. *Carolina, etc. Telegraph Co.*, 90 Fed. Rep. 29 (Cir. Ct., S. C.).

This decision extends to telegraph companies a doctrine heretofore applied only to railroad companies. The leading case, illustrative of the principle, which is of very recent growth, its *Fosdick* v. *Schall*, 99 U. S. 235. A railroad is deemed of such great

public interest that the courts have looked with favor on the claims of those furnishing material or labor necessary for its operation. When, therefore, courts of equity have exercised their jurisdiction in the appointment of a receiver, they have recognized the right to priority of the "current supply claimant." The case is one of conflicting equities, and the principle laid down is, that the net income, to which the lien of the mortgagee attaches, is subject to an equitable charge in favor of claims, coming under the head of current indebtedness, which have accrued before the appointment of the receiver. *Hale* v. *Frost*, 99 U. S. 389; *Burnham* v. *Bowen*, 111 U. S. 776; *Virginia, etc. Co.* v. *Central, etc. Co. of Georgia*, 170 U. S. 355. The same considerations which have influenced the courts in applying this doctrine to railroad companies justify the holding of the principal case in applying it to telegraph companies.

SALES — BILL OF LADING — PASSING OF TITLE. — While goods were *in transitu* the consignor sold them and drew on the buyer. He deposited the draft with the payee bank, together with the bill of lading indorsed to the buyer conditionally upon payment of the draft. The buyer paid the draft and received the bill of lading without notice of an intervening attachment of the goods as the consignor's property. *Held*, that the attachment was good. *Kentucky Refining Co.* v. *Globe Refining Co.*, 47 S. W. Rep. 602 (Ky.).

The court erroneously treats property and *jus disponendi* as necessarily synonymous. See Lord Cairns in *Ogg* v. *Shuter*, 1 C. P. D. 47; Lord Bramwell in *Mirabita* v. *Bank*, 3 Ex. D. 164. The time when title passes depends upon the intention of the parties as shown by all the facts. Benjamin, Sales, 4th Am. ed., § 308, *et seq.* It would seem better here to hold that title passed at the time of the contract of sale, since the goods were specific and ready for delivery, and the bill of lading already made out. The later dealing with the bill of lading shows only an intention by the seller to retain a *jus disponendi*, a power of controlling the possession of the carrier to secure payment of the purchase money. See above cases. This would make the attachment void. See *Peters* v. *Elliott*, 78 Ill. 321, where on similar facts this result is reached on the more prevalent American view that a bill of lading represents title. The dealing with the bill of lading is treated like a mortgage to the vendee to secure future advances, the vendee's title to the goods, acquired by payment of the draft, relating back to the time of the deposit of the bill of lading with the bank.

SALES — STOPPAGE IN TRANSITU — BONA FIDE PURCHASER. — A sold goods to B, who resold them to C in part payment of a pre-existing debt. A shipped them to C, deliverable to C's order by the bill of lading, which was sent to B. Before it was transferred to C and before the goods were deilvered, B became insolvent. *Held*, that A could not stop the goods. *Shepard & Morse Lumber Co.* v. *Burroughs*, 41 Atl. Rep. 695 (N. J., Sup. Ct.).

The court held that the *transitus* was not at an end, but that the delivery by A to B of a bill of lading drawn in the name of C was a delivery for C's benefit, and was as good as a delivery to C himself, and, lastly, that the satisfaction of a pre-existing debt is sufficient consideration for the transfer of a bill of lading to cut off the vendor's right of stoppage *in transitu*. On the first point the court is undoubtedly right. *Bethell* v. *Clark*, 20 Q. B. D. 615. Probably also on the last. *Leask* v. *Scott*, 2 Q. B. D. 376; *Lee* v. *Kimball*, 45 Me. 172. Benjamin, Sales, 4th Am. ed., § 866. On the second point, however, the court seems to be wrong. The bill of lading must be delivered by the vendee to the sub-vendee to defeat the vendor's right of stoppage *in transitu*, unless there comes in an element of estoppel not shown in this case. *Ex parte Golding*, 13 Ch. D. 628; *Kemp* v. *Falk*, 7 App. Cas. 573; Benjamin, Sales, § 862 (c), (d), 865 (a).

SURETYSHIP — DISAFFIRMANCE BY MINOR — SURETY'S LIABILITY. — The defendant was surety on a note, which was given by a minor in payment of certain property. Upon attaining his majority, the minor disaffirmed the contract and returned the property. *Held*, that defendant is not liable on the note. *Keokuk Co. State Bank* v. *Hall*, 76 N. W. Rep. 832 (Iowa).

The decision is rested upon the authority of *Baker* v. *Kennett*, 54 Mo. 82. The court, in departing from the recognized principle that the surety of an infant is bound, although the principal disaffirms his contract, is influenced by the apparent injustice of allowing the creditor to retain his property and at the same time recover the purchase price from the surety. But this difficulty can be avoided without denying the application of the general rule. A surety, upon discharging the obligation, is subrogated to the rights of the creditor against the principal, and, accordingly, the defendant in the present case would, upon payment of the note, acquire all of the creditor's rights to the property. By proceeding upon this theory, any loss due to a depreciation of the prop-

erty would not, as here, fall upon the creditor, but upon the surety, which is clearly a more equitable result.

SURETYSHIP — NATURE OF DEFENCES. — A surety on a note, which on its face showed him to be liable as a principal, filed a bill to enjoin its collection on the ground that time had been given to the real principal. *Held*, that the suit was properly brought in equity, as the facts show no defence to an action at law. *Grier* v. *Flitcraft*, 41 Atl. Rep. 425 (N. J., Ch.). See NOTES.

TORTS — CEMETERIES — TRESPASS. — *Held*, that one having the right of burial in a lot which is part of a public cemetery, can bring trespass *quare clausum fregit* against the owner of the fee for a disturbance thereof. *Hoff* v. *Olson*, 70 N. W. Rep. 1121 (Wis.).

There is but scant authority on this point. The action has been allowed when the trespass was committed by a stranger. *Smith* v. *Thompson*, 55 Md. 5. And the principal case has the direct support of one other decision. *Bessemer, etc. Co.* v. *Jenkins*, 111 Ala. 135. The owner of a lot in a public cemetery is generally regarded, in this country, as having only a license to bury therein to the exclusion of others. *Page* v. *Symonds*, 63 N. H. 17. While a court might be justified in allowing the action of trespass to such a licensee against a stranger, on the ground of possession, still, to allow it against the owner of the fee can hardly be reconciled in any way with legal principle.

TORTS — DECEIT — MISREPRESENTATION AS TO INTENTION. — The defendant persuaded the plaintiff to convey land to him on a promise to supply the plaintiff with certain live stock, etc. The defendant did not supply the live stock, and, in fact, never intended to keep his agreement. *Held*, that an action of deceit will lie. *McCready* v. *Phillips*, 76 N. W. Rep. 885 (Neb.).

It is well settled that a false representation, in order to form the ground for an action of deceit, must be of some past or existing fact. Some jurisdictions hold, contrary to the present case, that a false representation as to a matter of intention, or a promise to perform an act made with the intention not to perform is not a misrepresentation of an existing fact upon which an action of fraud may be founded. *Dawe* v. *Morris*, 149 Mass. 191; *Farris* v. *Strong*, 48 Pac. Rep. 963 (Colo.). The better opinion seems to be, in accord with the present case, that an action of deceit will lie. In the oft-quoted words of Lord Bowen, in *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. D. 459, "the state of a man's mind is as much a fact as the state of his digestion," and a misrepresentation as to this state of mind is, therefore, a misstatement of an existing fact. *Swift* v. *Rounds*, 19 R. I. 527; *Stewart* v. *Emerson*, 52 N. H. 301.

TRUSTS — FRAUD BY AGENT — STATUTE OF FRAUDS. — Defendant orally agreed to act as agent for plaintiffs to purchase certain land in their name. He, however, had the conveyance made out to himself, paid for it with his own money and denied the agency. *Held*, that defendant is liable to plaintiffs as trustee *ex maleficio*. *Halsell* v. *Wise County Coal Co.*, 47 S. W. Rep. 1017 (Tex., Civ. App.).

There is much authority holding that the defendant is not liable on these facts, on the ground that the trust is created by the agreement of agency, and so is within the section of the Statute of Frauds requiring declarations of trusts in land to be in writing. *Burden* v. *Sheridan*, 36 Iowa, 125; *Nestal* v. *Schmid*, 29 N. J. Eq. 458. The result in the principal case seems more just and to be reached by sounder reasoning. Agency, though created by an agreement, is properly a relation or status, which, for a particular purpose, is fiduciary, and involves the devotion of the agent to his principal's interests. An abuse by the agent of this fiduciary relation is a fraud on his principal, and renders him liable for the proceeds of his wrongful act as a constructive trustee. This trust, then, really results by operation of law, and so is not within the Statute of Frauds. Browne, Statute of Frauds, § 96; *Winn* v. *Dillon*, 27 Miss. 494; *Jenkins* v. *Eldredge*, 3 Story, 181, 290.

REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. By James Bradley Thayer. Boston: Little, Brown & Co. 1898. pp. xxxvi, 636.

It is a bold thing to say of a book that it expresses what has not been said before; but two things Professor Thayer emphasizes which before